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In the Supreme Court of the United States

OCTOBER TERM, 1961

THOMAS C. CORNELL, MARC PAUL EDELMAN AND ROY LISKER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

RALPH S. SPRITZER,
Acting Solicitor General

FRED M. VINSON, JR.,
Assistant Attorney General

[illegible]
[illegible]
Department of Justice,
[illegible]

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES

Having waived trial by jury, petitioners were convicted after a trial in the United States District Court for the Southern District of New York of having knowingly destroyed and mutilated their Selective Service certificates in violation of Section 12(b)(3) of the Universal Military Training and Service Act, 50 U.S.C. App. (Supp. I) 462(b)(3), as amended in 1965 by 79 Stat. 586. Each petitioner was sentenced to six months' imprisonment.

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The facts—which are not in dispute—show that petitioners burned their Selective Service certificates[1] at a rally in Union Square, New York City on November 6, 1965, sponsored by the Committee for Non-Violent Action. At this rally, and prior to their individual acts of destruction, each of the petitioners made a statement to the effect that this act of destruction was in protest against the war in Vietnam and the statute prohibiting draft-card burning.

The court of appeals affirmed the convictions, rejecting the contention that the statute infringes the First Amendment (Pet. App. 1-6).

The sole issue presented by the instant petition—the validity of the 1965 amendment punishing wilful destruction or mutilation of Selective Service certificates—is before the Court in *United States* v. *O'Brien*, No. 232, this Term, certiorari granted, October 9, 1967. In *O'Brien*, the government is seeking review of the First Circuit's holding that the statute is contrary to the First Amendment.[2] The same statute

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[1] Petitioner Cornell destroyed both his Registration Certificate and his Notice of Classification. Petitioners Edelman and Lisker destroyed their Registration Certificates.

[2] While finding the statute unconstitutional, the First Circuit affirmed O'Brien's conviction (although vacating the sentence and remanding for resentencing) on the finding that his conduct violated a Selective Service regulation (32 C.F.R. 1617.1) which requires Selective Service registrants to keep their Registration Certificates in their "personal possession at all times." See 50 U.S.C. App. 462(b)(6). The Court has granted O'Brien's cross-petition for certiorari which challenged the affirmance of the conviction on this ground (No. 233, O.T. 1967).

was earlier upheld against a like claim of constitutional infirmity by the Second Circuit in *United States* v. *Miller*, 367 F.2d 72, certiorari denied, 386 U.S. 911,[3] and by the Eighth Circuit in *Smith* v. *United States*, 368 F. 2d 529.

Contrary to petitioners (Pet. 10-14), we do not believe that it is necessary to grant the petition in the instant case because it involves the destruction of a Registration Certificate as well as a Selective Service Notice and because petitioners were not classified 1-A at the time of destruction—but respectively 1-O (Cornell) and 4-F (Edelman and Lisker). While the instant case may thus be characterized as factually "distinguishable" from *Miller* and from *O'Brien*, we agree with the view of the court below that these distinctions do not materially affect the resolution of the constitutional issue. As that court pointed out (Pet. App. 5-6):

> It would be most arbitrary to rule that the amendment was constitutional with respect to one document but not with respect to another. As regards the second distinction, the Selective Service System might be just as interested in knowing who is not subject to call at a time of emergency as it would be in knowing who is subject to call.

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[3] This Court denied the petition for a writ of certiorari in *Miller* on February 13, 1967. On May 1, 1967, after the First Circuit had decided *O'Brien* (on April 10, 1967), and after the time for filing a petition for rehearing had expired, petitioner in *Miller* moved this Court for leave to file a petition for rehearing. The Court has not yet acted on that motion.

Since the disposition in *O'Brien* should govern this case equally, the Court may wish to defer action on the instant petition until *O'Brien* is decided.

Respectfully submitted.

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